FILE COPY.

No. [redacted] 209

Office Supreme Court U. S.
FILED
FEB 24 1906
JAMES H. McKENNEY,
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

ALBERT K. HISCOCK, TRUSTEE IN BANKRUPTCY, OF JACOB M. MERTENS, *et al.*

Petitioner,

vs.

JACOB M. MERTENS,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

J. P. Fralick, Law Case Printer, 100 Wieting Blk.

IN THE

SUPREME COURT OF THE UNITED STATES.

ALBERT K. HISCOCK, TRUSTEE IN BANKRUPTCY, OF JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS AND EDMUND A. MERTENS, INDIVIDUALLY AND AS COMPOSING THE COPARTNERSHIP FIRM OF "J. M. MERTENS & Co.", *Bankrupts*,

Petitioner,

vs.

JACOB M. MERTENS,

Respondent.

BRIEF FOR RESPONDENT.

The respondent contends that under the rules laid down by the Supreme Court, no case for the granting of a writ of certiorari has been made, and that a review of the decision of the Court below is unnecessary and inexpedient for the following reasons:

I.

To the parties the matter is of small and rapidly diminishing importance.

Nominally, four policies of insurance aggregating $100,000. are involved; actually, a comparatively small sum is in issue.

In the first policy, No. 252314, issued by the Equitable Life Assurance Society for the sum of $10,000., it is conceded the trustee has no interest. (Petition, Fol. 9.)

Policy No. 417171, issued by the Equitable Life Assurance Society of the United States, insured the life of the respondent in the sum of $50,000. At the time of the adjudication in bankruptcy it was encumbered for many times its value. Pending this proceeding it has been sold at public auction by the pledgee thereof, bringing a small part only of the amount for which it was pledged. Neither the trustee nor the bankrupt have paid premiums on the same. An examination of the record, (Fols. 122-127, 305-315) sufficiently demonstrates that this policy has no value to the parties to this proceeding and it may be dismissed from further consideration.

Of the two remaining policies, No. 274445 insuring the life of the respondent in the sum of $20,000. is a *semi-tontine* policy *Form number H-83* issued by the

Equitable Life Assurance Society March 10, 1884. It had, therefore, been in force about nineteen years and six months at the time of the filing of the petition in bankruptcy and there remained to be paid but one semi-annual premium to mature the same. It was pledged to the Equitable Life Assurance Society to secure the payment of the sum of $2500. and had in accordance with the uniform practice of the Company a cash surrender value of $5905.65. (Fol. 169). This sum the Company was ready and willing and offered to pay upon its surrender, and this sum the bankrupt was ready and willing and offered to pay the trustee. On March 10, 1904, the date of its maturity, it had an actual value of $11,318.40, less the last premium upon the same paid by the receiver of the respondent's estate in bankruptcy, less the amount of the encumbrance on the policy. (Fol. 180). This is considerably more than the cash surrender value a few months earlier. Still it has never been the policy of Life Insurance Companies to permit policy holders to withdraw before maturity the profits on their policies, or any sum approximating the matured value thereof. To do so would be to place a premium on lapses and withdrawals. The amount which the Company will pay in cash or paid-up insurance is usually regulated, as in New York, by a State statute, applying without discrimination to all policies and requiring some return to be made to the withdrawing policy holder after default in payment of a premium. The cash surrender value offered by the

Company in this case was the full cash surrender value of the paid-up policy, which the Company was compelled by law to issue. (Fols. 362-367). It did not include the profits on the policy as distinguished from the reserve as that the law of New York does not require. (Fol. 365). There is nothing in the record to indicate that any Company ever distributes its profits before the actual maturity of a policy.

This cash surrender value is paid by Insurance Companies because the laws of the various States now require it or its equivalent to be paid; hence, in the new certificates issued by some Companies a definite cash surrender value is stated. *The time, terms and conditions on which the policy in question would be received on surrender are precisely the same as in the case of a policy having a definite provision for a cash surrender value.* (Fols. 150-152, 154, 155, 160-164). The petitioner's argument that the cash surrender value of policies issued on this form was less than those of some other form is not borne out by any evidence in the record.

The other policy in question here is called a *Free Tontine* Policy *Form No. H-89.* It was issued by the Equitable Life Assurance Society of the United States January 28, 1889, and insured the life of the respondent in the sum of $20,000. It was hypothecated to the Equitable Life Assurance Society to secure the payment of a loan of $1775. and had a cash surrender value of $2272.56, what its value at maturity will be is not known. (Fol. 169).

Upon these two policies annual premiums have been paid aggregating $1270. and this is the third year since the respondent was declared a bankrupt. These premiums have been paid by the trustee, but under an agreement that he shall be re-paid the same with interest, in addition to the cash surrender value, in case the bankrupt is permitted to redeem the policies. (Fols. 315-327). The premiums paid on policy No. 274445, the most valuable of the policies, are absolutely lost. The policy having matured these premiums simply keep it alive and in no way enhance its value; hence, every year that realization on these policies is postponed diminishes the already small difference between the cash surrender values and the maturity values, which difference only is in question here.

II.

The matter is not of public or general importance.

The Bankruptcy Act, §70a-5, refers to the policy which may be redeemed and retained by the bankrupt as "any insurance policy which has a cash surrender value." It does not undertake to distinguish between the various forms of policies, neither should the Courts do so.

The argument of the petitioner goes to the details of these policies. It involves no general principles. He

says, in substance, that under these particular and peculiar policies issued by this particular Society, there are investment features which distinguish them from some of the other forms of policies which have a cash surrender value. That this is particularly so in the State of New York, where the statute permits the insured to demand a paid-up policy upon default in paying a premium, but does not permit him to demand cash. *The distinction is not very great, however, as it is conceded that the paid-up policy issued pursuant to Statute has itself a cash surrender value.* (Petition, Fol. 20).

An effort to set up arbitrary distinctions between the various forms of policies, between the policies written at different periods and by divers Companies, Societies, Associations and Fraternities, and between their provisions as controlled and regulated by the statutes of the various States, would lead to endless confusion and often to unfair discrimination. Why look for distinctions where none are made by the Statute?

The Supreme Court has very wisely decided that it is better to follow the Statute which permits the bankrupt to pay or secure to the trustees the cash surrender value of "any insurance policy which has a cash surrender value" and thereafter to continue to "hold, own and carry" the same. (*Holden vs. Stratton*, 198 U. S., 214).

Upon petitoners's theory of this proceeding, a further decision of the Supreme Court would settle the law as to one only of the countless forms of life insurance policies.

It would be an authority as applied to Equitable policies *Form H-83 and Form H-89* and as to other forms not involved would be *obiter*. Adopting the petitioner's views as to *obiter dicta* a decision would be of no avail beyond this particular controversy, and upon the general proposition, the Supreme Court has already expressed itself with great clearness.

III.

The decision of the Circuit Court of Appeals is unquestionably correct.

It is not our intention here to re-argue the merits of this controversy. It is probably sufficient to suggest that the decision of the Circuit Court of Appeals followed the plain command of the Statute and the decisions of its own Circuit, which had stood unquestioned for thirty years.

In re McKinney, 15 Fed. Rep., 535.
In re Newland, 6 Ben., 342.
Warnock vs. Davis, 104 U. S., 775.
In re Boardman, 103 Fed. Rep., 783.
In re Steele, 98 Fed. Rep., 78.
Steele vs. Buell, 104 Fed. Rep., 972.

IV.

The Circuit Court of Appeals expressly followed the principles laid down by the United States Supreme Court in the case of Holden vs. Stratton. 198 **U. S.,** 214.

The decision is not only in exact accord with the concluding sentences of the opinion in the above case, but to quote therefrom *"harmonizes with the practice under the Bankruptcy Act of 1867 * * * and tends to elucidate and carry out the purpose contemplated by the proviso as we have construed it."*

The deliberate opinion of the United States Supreme Court in the case of Holden vs. Stratton was a sufficient precedent for the Circuit Court of Appeals in the decision of this case, and is ample to guide the lower Courts in answering questions as to the various forms of life insurance policies involved in almost every bankruptcy proceeding, without an express decision of the Court of last resort as to each form of certificate. Any cases that seem to differ from the decision of the Circuit Court of Appeals herein were rendered prior to the decision of the Supreme Court in the case of Holden vs. Stratton. The decision in that case was sufficient to settle any doubt that had therefore existed as to the construction of the clause of §70 under consideration here.

V.

'It is not for the best interest of bankrupt estates that intermediate orders and directions in bankruptcy made by the Circuit Court of Appeals in the exercise of its supervisory power should be subject to review by this court, except it be in cases of great importance or where public interests are involved.

In addition to very generous rights of appeal the National Bankruptcy Act provides for review of minor controversies by petition. Questions arise in the midst of a bankruptcy proceeding upon which the trustee desires instructions and they may be brought up, while the proceeding proper is pending, by petition to review. The complete record is not printed, but only the part thereof relating to the particular matter of which revision is desired.

It was clearly the intention of the statute by these provisions to furnish a summary method of reviewing intermediate orders and directions of the Bankruptcy Court; for frequently pending the decision thereof, all progress in the settlement of the bankrupt's estate is necessarily stayed. The matter which it is now sought to bring into the Supreme Court is one of this character. It relates to a review by petition of an intermediate order in a bankruptcy proceeding from which no appeal would lie. It has been decided by the Circuit of Appeals in a

manner consistent with the decisions on the same and similar subjects by the Supreme Court. The administration of a very large estate should not further be delayed where no matter of public or general importance is involved, and where the rights of the litigants and creditors would suffer thereby.

It is urged that the Circuit Court of Appeals desires to have its decision reviewed by this Court. The Circuit Court of Appeals has taken no steps to that end by certification of questions or otherwise and has said nothing to indicate that it has any wish upon the subject.

For the reasons above briefly stated and which appear more fully from an examination of the record, the respondent respectfully submits that the prayer of the petitioner should be denied with costs.

DORR RAYMOND COBB,
of Counsel for Respondent.